(3)

No. 00-203

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLEVELAND INDIANS BASEBALL COMPANY,
A LIMITED PARTNERSHIP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

1. Respondent errs in claiming (Br. in Opp. 2-8) that there is no conflict among the circuits on the question presented in this case. Both of the courts below acknowledged that this conflict exists. The district court, which was bound to apply the Sixth Circuit's decision in *Bowman* v. *United States*, 824 F.2d 528 (1987), noted that "at least one court has disagreed with *Bowman* since that decision was issued, instead applying the allocation the government urges here." Pet. App. 10a-11a. The court of appeals was also frank in acknowledging that "cases from our sister circuits * * * are at odds with our *Bowman* holding." *Id.* at 5a. Contrary to respondent's claim, the decision in this case

thus involves an acknowledged circuit conflict on an issue of recurring importance.

Respondent nonetheless attempts to parse these conflicting decisions in an effort to construct distinctions among them. For example, respondent argues that *Hemelt* v. *United States*, 122 F.3d 204 (4th Cir. 1997), does not conflict with the decision in this case for two reasons: (i) because "*Hemelt* does not even cite *Bowman*" and (ii) because, in reaching a decision in *Hemelt* on "the question presented here" that directly conflicts with the result reached in *Bowman*, the analysis of the court in *Hemelt* "was perfunctory" (Br. in Opp. 3). Neither rationale supports the proposition that these two decisions are not in conflict.

As we explain in the petition (Pet. 18-19), although the taxpayers in *Hemelt* expressly relied on *Bowman*, the court of appeals concluded that the reasoning applied in that case was "meritless." 122 F.3d at 210. While the Fourth Circuit in *Hemelt* did not cite *Bowman* in stating that its reasoning was "meritless," these two decisions are squarely in conflict—as both the district court and the court of appeals acknowledged in this case. Pet. App. 5a, 10a. Indeed, respondent has itself grudgingly acknowledged the existence of this conflict. Respondent admits (Br. in Opp. 3) that the court in "*Hemelt* took up the question presented here" and that its decision on that question is inconsistent with the decision reached in *Bowman*.

Respondent nonetheless contends that, in deciding "the question presented here" in a manner that conflicts with *Bowman*, the *Hemelt* court employed "little discussion" and only a "perfunctory" legal analysis. Br. in Opp. 3. Respondent suggests (*ibid.*) that the "conclusory" reasoning of *Hemelt* is insufficient to establish a "conflict" among the circuits.

We of course disagree with respondent's derogatory description of the reasoning applied by the Fourth Circuit in the *Hemelt* decision. That court's conclusion that the FICA tax applies to wages when "received" rather than "to the years to which [wages] are attributable" (122 F.3d at 210) is squarely supported by the clear text and history of the statute and its implementing regulations. See also Pet. 8-18. It is, in any event, evident (as respondent concedes) that the *Hemelt* court in fact *did* rule upon "the question presented here" and, in doing so, *did* reach a result that conflicts precisely with the decision in *Bowman* (and therefore with the decision in the present case). As a published decision, *Hemelt* is no less binding precedent in the Fourth Circuit than *Bowman* is in the Sixth Circuit.[1]

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[1] Respondent also argues (Br. in Opp. 5) that *Walker* v. *United States*, 202 F.3d 1290 (10th Cir. 2000), does not conflict with the decision in this case because *Walker* involved the *self*-employment taxes imposed under Subtitle A of the Internal Revenue Code instead of the FICA employment taxes imposed under Subtitle C of the Code. Although respondent suggests that this means the underlying statutory issues are only "superficially similar" (Br. in Opp. 7), there is in fact no analytical difference: the self-employment tax is imposed on income from self-employment; the FICA tax is imposed on income from employment by others. In holding that the self-employment tax applies to wages at the time they are paid, rather than at the time when the services for which the compensation is made were performed, the court in *Walker* expressly rejected the contrary conclusion of the Sixth Circuit in *Bowman* as "unpersuasive." 202 F.3d at 1293. The court in Walker also concluded, in agreement with our position (and contrary to respondent's), that the decision in *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), is "inapposite" to the issue in this case. Compare Pet. 14-16 with Br. in Opp. 9-10.

Even in situations in which courts do not write extensively to set forth their reasoning, if they have reached differing conclusions on the same question of law, the result is that litigants will be subject to different rules in different circuits. For example, due to the conflicting decisions on the question presented in this case, taxpayers in some circuits will pay different amounts of taxes than will be paid by similarly situated taxpayers elsewhere. It is precisely that sort of conflict among the circuits that frustrates the uniform application of national rules of law and therefore warrants resolution by this Court.

2. Respondent is wrong in asserting (Br. in Opp. 8-9) that the question presented in this case lacks recurring importance. As we describe in the petition, the settlement agreement involved in this case has already led to litigation in nine separate suits filed in four separate circuits (First, Third, Eighth and Ninth). See Pet. 23. An additional 17 suits stemming from this settlement may yet be filed in additional circuits. See *ibid.*

The question presented here arises routinely whenever taxpayers receive (or pay) back wage awards. See Pet. 22. Of course, the amount of back wages awarded to the baseball players involved in this litigation exceeds the amount ordinarily at issue in such cases. The taxpayer's incentive to litigate the issue is accordingly greater here than is ordinarily the case. Nonetheless, as respondent acknowledges (Br. in Opp. 8), this same issue has been litigated in the past in several reported (and unreported) cases. See also *Tungseth* v. *Mutual of Omaha Ins. Co.*, 43 F.3d 406, 409 (8th Cir. 1994) (noting that "there is a split of authority whether back wages are subject to FICA taxation in the years to which the back pay relates or in the year in which the award is

received"); *Cohen* v. *United States*, 63 F. Supp. 2d 1131, 1135 (C.D. Cal. 1999) (declining to apply *Bowman* and concluding that severance payments were taxable when paid, not when earned); *Mazur* v. *Commissioner*, 986 F. Supp. 752, 754 (W.D.N.Y. 1997) (expressly rejecting *Bowman* and holding that FICA applies to wages when received rather than when earned); *Algie* v. *RCA Global Communications, Inc.*, No. 89 CIV 5471, 1995 WL 606096 (S.D.N.Y. Oct. 12, 1995). Moreover, the frequency of such disputes is likely to be enhanced by the decision in the present case.

3. Respondent devotes the largest portion of its brief to an effort to defend the *Bowman* decision on the merits. The contentions aired in respondent's brief are incorrect for the reasons we have explained in the petition. See Pet. 8-18. Respondent's contentions are, moreover, precisely the same as those rejected by the courts of appeals in the *Hemelt* and *Walker* cases. In short, respondent's claim that "*Bowman* got it right" (Br. in Opp. 9) is wrong.[2] Until this Court addresses and resolves the conflict that exists among the circuits on the question presented in this case, however, the "*Bowman* rule" (*ibid.*) will continue to apply in the

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[2] Respondent fails to address the statutory text, legislative history and regulations that govern the question presented in this case. See Pet. 8-18. Instead, respondent relies upon general, unfounded contentions such as the notion that the government's position has the effect of "punish[ing]" employees "for being victims." Br. in Opp. 10. Of course, the government's position seeks to punish no one. The government seeks only to enforce the statute in the manner that Congress has directed. Moreover, as we point out in the petition, the position advocated by respondent would often cause taxpayers to pay *more* taxes. Pet. 17-18. Not only is "*Bowman* * * * expensive for most taxpayers, it also imposes substantial administrative burdens on the IRS." K. Gideon, *Lawsuits and Settlements* § 1101.4, at 263 n.42 (1995).

Sixth Circuit and taxpayers will continue to be treated differently based solely upon the geographical happenstance of the circuit in which they reside. For the reasons stated here and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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